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In the

Supreme Court of The United States

OCTOBER TERM, 1972

No. 73-167

GRAFF VENDING COMPANY, et al.,

Petitioners,

v.

KENNETH J. HAMPTON,
d/b/a HAMPTON VENDING SUPPLY,

Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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Graff Vending Company, Floyd V. Price, and Herbert Goldstein, Petitioners, respectfully pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered in the above cause on May 9, 1973.

OPINION BELOW

The opinion of the Court of Appeals is not yet officially reported; it is printed in Appendix B, infra, pp. B-1 - B-17.

JURISDICTION

The Judgment of the Court of Appeals was dated and en-

tered on the same day as the Opinion, May 9, 1973, and is printed in Appendix C, infra, p. C-1. Petitioners' Motion for Rehearing was denied by the Court without an opinion by Order dated June 11, 1973, which Order is printed in Appendix D, infra, p. D-1.

There was no formal opinion of the District Court. The Judgment of the District Court for the Western District of Texas is printed in Appendix E, infra, pp. E-1 - E-2. The Findings of Fact and Conclusions of Law of the District Court are printed in Appendix F, infra, pp. F-1 - F-6.

The jurisdiction of the Court is invoked under 28 U.S.C.A. § 1254(1).

QUESTIONS PRESENTED

1. Whether the Court of Appeals, on appeal from a judgment on the merits by the District Court, rightly held that the District Court tried the case on the wrong theory and, therefore, the Court of Appeals was not bound by the District Court's Findings of Fact.

2. Whether the Court of Appeals properly disregarded the Findings of Fact of the District Court where the Findings were not shown to be clearly erroneous as provided in Rule 52(a), F.R.C.P., 28 U.S.C.A.

3. Whether the Court of Appeals should reverse and remand this cause to the District Court for further consideration of injunctive relief and attorney fees where Respondent admitted, through his attorney, that he had suffered no monetary damages and failed to prove monetary damages.

STATUTES AND RULES OF CIVIL PROCEDURE INVOLVED

This case involves the Clayton Act, as amended by the Robinson-Patman Act, Title 15 U.S.C.A. Sec. 13(a) and (b), Title 15, U.S.C.A., Sec. 15 and 26, and Rule 52(a) of the Federal Rules of Civil Procedure, which are printed in Appendix A, infra, pp. A-1 - A-4.

STATEMENT

This action was instituted by Respondent in the United States District Court for the Western District of Texas seeking a preliminary and permanent injunction, as well as damages and attorney's fees, alleging that Respondent "* * * has heretofore purchased said Leaf gum from the Defendant, Graff Vending Co.", (C.A. Appendix, p. 7). Respondent contended that a sale put on by Petitioners, multi-market sellers, in the Houston and San Antonio geographical market areas violated "* * * Title 15, U.S.C. Section 13(a) by discrimination in prices, the effect of such discrimination being to substantially lessen competition, by eliminating competition from your Plaintiff, and to tend to create a monopoly in this particular line of commerce * * *" (C.A. Appendix, p. 8). Respondent contended his current cost of goods would not permit him to make a profit if he meets Petitioners' prices.

Upon hearing the Application for a Preliminary Injunction, the District Court granted same enjoining the Petitioners from selling through the San Antonio office or to their San Antonio office customers "* * * ball gum, charms and bulk vending machines at a price less than that at which defendants were selling said products through the San Antonio office or to the

San Antonio office customers prior to May, 1972 * * *" (C.A. Appendix, p. 14).

At the preliminary injunction hearing, the evidence showed that the manufacturer of Leaf Gum gave a discount to Petitioner Graff Vending Co. on merchandise to be sold in the San Antonio and Houston offices and it was this discount that was passed along by Petitioner Graff Vending Co. to its customers (Supp. Tr. p. 60) so that the merchandise was not sold "* * * at and below cost * * *"as alleged by Respondent. The evidence showed at trial on the merits that, even at the sales price, Leaf Gum was higher than American Gum (Tr. p. 61). The evidence failed to show that Respondent could not purchase from Petitioner Graff Vending Co. at the sale price like any other customer. While the preliminary injunction was in force, Respondent sold the same type vending machines for $156.00 that the Court order required Petitioners to sell for $192.50 (Tr. p. 67).

The District Court entered its judgment dissolving the preliminary injunction, denying permanent injunctive relief, damages, attorney fees and costs. (App. E, p. E-2.)

Respondent appealed that judgment to the United States Court of Appeals for the Fifth Circuit. The Court of Appeals entered judgment May 9, 1973, reversing the cause and remanding it to District Court in accordance with the opinion of the Court of Appeals of the same date which affirmed the District Court's judgment on damages since there was a failure of proof of damages but instructed the District Court to give further consideration to permanent injunctive relief, attorney fees and costs. The Court of Appeals' opinion (See App. B, p. B-16)

held that the District Court tried the case on the theory of secondary line discrimination instead of primary line discrimination and, therefore, the findings of the District Court are not entitled to the mantle of protection normally afforded District Court findings under Rule 52(a), Fed. R. Civ. P.[1] The Court of Appeals found "* * * after a careful review of the record, that there is both a reasonable probability, that the effect of Graff's reduced prices on Leaf Gum products may be to substantially lessen competition."[2]

Petitioners filed their Motion for Rehearing,[3] calling the attention of the Court of Appeals to the District Court's remarks beginning on line 23, page 8 of the Transcript, which Petitioners alleged showed the District Court did try the case on the right theory and, since the District Court's Findings of Fact upon which the judgment was based were supported by the evidence, same should not be set aside in that they were not clearly erroneous.[4] The Motion for Rehearing was denied by the Court of Appeals on June 11, 1973 (See Appendix D, p. D-1) and the Mandate was stayed to July 26, 1973.

REASONS FOR GRANTING WRIT

1. Direct conflict with decisions of this Court.

The Court of Appeals for the Fifth Circuit has decided a Federal question of substance in a way that is not in accord with applicable decisions of this Court. The Circuit Court's

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[1] Rule 52(a), Fed. R. Civ. P., Appendix A-1.

[2] The District Court's Findings of Fact included "11. The sale put on in the San Antonio and Houston office would not have the effect of substantially lessening competition."

[3] See Motion for Rehearing transmitted from the Court of Appeals.

[4] Rule 52(a), Fed. R. Civ. P., Appendix A-1.

holding that "* * * the Court's findings had obvious reference to a case of secondary line discrimination. While we have no quarrel with the finding in that context, it is in no way binding on us when the case is properly construed as primary line discrimination * * *" completely ignores the record of the District Court on the merits where the District Judge noted "He's apparently a wholesaler in some respects and a retailer in others. At one place, he couldn't be a competitor and the other one, he might be."[5] The holding also ignores the District Judge's interrogation of the Petitioner's sales manager where the Court directed the following question to the sales manager and received the answer indicated:

> "Q. Is Hampton a competitor of yours in either of two categories, as an operator or as a wholesaler? And if so, explain to me why.
>
> A. He's a competitor of ours as a wholesaler, using that term, sir, because he is selling merchandise to operators in this area in competition with us."[6]

The Court's holding that "* * * Although other companies manufacture comparable gum the evidence indicated no substantial competitive activity by them in the San Antonio area before the sale, much less during it", is contrary to the record in this cause.[7]

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[5] For entire exchange between the Court and counsel for Respondent, see Transcript on merits, beginning line 23, page 8.

[6] For the Court's complete interrogation of the witness, see Transcript on the merits, beginning line 17, page 58.

[7] See Supp. Tr., testimony at preliminary injunction, beginning line 21, page 65, as follows:

> "A. American Gum Company, the company that Mr. Hampton has bought the gum from and Creamer Gum Company and large operators there have been selling gum in the Houston area, in the San Antonio area at prices that we compute to be the same as they are selling to Mr. Hampton no matter what their category was. This

The decision of the Court of Appeals is in conflict with the decision of this Court in *United States of America v. Yellow Cab Company*, 338 U.S. 338, 94 L. Ed. 150, 70 S. Ct. 177, where this Court stated at page 340:

> "What the Government asks, in effect, is that we try the case *de novo* on the record, reject nearly all of the findings of the trial court, and substitute contrary findings of our own.
>
> * * * If defendants' witnesses spoke the truth, the findings are admittedly justified. The trial court listened to and observed the officers who had made the records from which the Government would draw an inference of guilt and concluded that they bear a different meaning from that for which the Government contends.
>
> It ought to be unnecessary to say that Rule 52 applies to appeals by the Government as well as to those by other litigants. There is no exception which permits it, even in an antitrust case, to come to this Court for what virtually amounts to a trial *de novo* on the record of such findings as intent, motive and design. While, of course, it would be our duty to correct clear error, even in findings of fact,

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cut into our business in the Houston and the San Antonio areas. So we went to Leaf Gum Company and asked them could we get some promotional help in order to retain some of our business that we were losing to American Gum, Creamer Gum and other gum companies who were selling direct to the operators. Leaf Gum Company gave us an allowance of $1.50 a case on penny gum, 90 cents a case on nickel gum. That is the exact figure that we have passed on to our operators.

Q. Okay. And that was arranged through you and Leaf Company because of the competition that you were having in the Houston and San Antonio areas, is that correct?

A. From out-of-state gum companies, yes, sir."

Other out-of-state gum companies are identified as Standard Specialty Company of Oakland, California, U.S. Chewing Gum Company of Oakland, California, Fleer Gum Company of Havertown, Pennsylvania and Don Russ Gum Company of Memphis, Tennessee. See Transcript on the merits beginning line 22, page 55, through line 9, page 56.

> the Government has failed to establish any greater grievance here than it might have in any case where the evidence would support a conclusion either way but where the trial court has decided it to weigh more heavily for the defendants. Such a choice between two permissible views of the weight of evidence is not 'clearly erroneous.'"

The action of the Court of Appeals amounted to a trial de novo in that Court, setting aside the findings of the District Court and substituting its own findings therefor. The District Court's finding number 11 found the sale would not have the effect of substantially lessening competition but the Court of Appeals found "* * * After careful review of the record, that there is both a reasonable possibility and a reasonable probability that the effect of Graff's reduced prices on gum products may be to substantially lessen competition." (Appendix B, p. B-10).[8]

The Government in the *Yellow Cab Co.* case, supra, had argued that the trial court's findings should be set aside on the ground of a "definite and firm conviction that a mistake had been made", citing *United States v. United States Gypsum Co.*, 333 U.S. 364, 92 L. Ed. 746, 68 S. Ct. 525, but this Court rejected said argument as being inapplicable. The Court of Appeals in this case committed the error that the Government unsuccessfully urged on this Court in *Yellow Cab*, supra.

In holding that Petitioners failed to prove a Sec. 2(b) defense, Title 15 U.S.C.A. § 13(b), the Court of Appeals also

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[8] The Court of Appeals cited Federal Trade Commission v. Morton Salt Company, 1948, 334 U.S 37, but an examination of that case indicates that this Court left the responsibility for finding the facts to the Federal Trade Commission, which Commission, like the District Court Judge in this case, was asked to make a finding on whether or not the price difference would injure or destroy competition.

disregarded the District Court's Findings of Fact. Under Rule 52(a), this Court has long held that where findings of the Trial Court are supported by the evidence, they will not be disturbed on appeal. *Atlantic and Pacific Tea Co. v. Grosjean*, 1937, 57 S. Ct. 772, 301 U.S. 412, 420, 81 L. Ed. 1193, 112 A. L. R. 293, rehearing denied, 58 S. Ct. 3, 302 U.S. 772, 82 L. Ed. 599. Petitioners in this case introduced sufficient evidence for the Trial Court to find a Sec. 2(b) defense. That proof was sufficient to demonstrate to the Trial Judge the existence "* * * of facts which would lead a reasonable and prudent person to believe that the granting of a lower price would in fact meet the equally low price of a competitor * * *" and this is in accordance with this Court's holding in *Federal Trade Commission v. A. E. Staley Manufacturing Company*, 1945, 324 U.S. 746, 89 L. Ed. 1338.

2. Conflict with decisions of other Courts of Appeal.

Although the Court of Appeals cited *Calloway Mills Co. v. Federal Trade Commission*, 5th Cir., 1966, 362 F. 2d 435, in support of its decision in this case, a careful examination of that case reflects that the Court of Appeals held the Federal Trade Commission's conclusions to be arbitrary and in complete disagreement with the findings of the Trial Examiner and material and substantial evidence upon which the Trial Examiner made his findings. The Court of Appeals in this case fell into the same errors as did the Federal Trade Commission in the Calloway Mills case, supra.

Petitioner's supplier reduced the cost to Petitioner on the gum. Petitioners passed this reduction in cost along to its customers. It has been held that:

> "We do not believe, as apparently the Commission does, that the Robinson-Patman Act was intended to freeze prices at the level which would return a profit to a competitor in a market with the highest costs. For such an interpretation of the act would sacrifice the interests of the consumer and competition to the interests of a single competitor." *Dean Milk Co. v. Federal Trade Commission*, 7th Cir. 1968, 395 F. 2d 696, 701.

Although Respondent competed with Petitioners in the wholesale portion of his business,[9] the evidence also showed that shortly before Petitioners' sale the Respondent purchased his gum from Petitioners and, therefore, competed with Petitioners on some basis other than price.[10] Petitioners had lost customers, Respondent being one of its customers it had lost. The Petitioner was not attempting to put Respondent out of business but, on the other hand, was attempting to regain him as a customer in both his retail business in which he did not compete with Petitioner, as well as his wholesale business in which he did compete with Petitioner but, as aforesaid, not necessarily on the basis of price. In *Balian Ice Cream Co. v. Arden Farms Co.*, 9th Cir. 1955, 231 F. 2d 356, writ of certiorari denied 1956, 76 S. Ct. 545, the Court held that:

> "Arden did not embark upon a campaign by selling goods shipped in interstate commerce at a loss in a local area to punish or designedly try to cause loss to one weaker competitor. It had no design to eliminate such a competitor and put him out of business by giving guaranties against loss to its own sales customers. Therefore, the doctrine of Porto Rican American Tobacco Co. of Porto Rico v. American Tobacco Co., 2 Cir., 30 F. 2d 234, has no relation to the situation here.

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[9] Respondent was also in the retail business in the San Antonio area but Petitioners were not in the retail business.

[10] See Court of Appeals Appendix, p. 7.

> * * * The difference in price between various states did not substantially lessen competition or tend to create a monopoly in ice cream products. There was no evidence that trade or commerce, interstate or otherwise, was lessened or burdened by any action of defendants in this case."

This case differs from *Surprise Brassiere Co. v. Federal Trade Commission*, 5th Cir. 1969, 406 F. 2d 711, in that the Commission found the facts against Surprise in that case and the Court of Appeals found there were no facts to warrant a different finding. In this case, as stated above, the District Court made Findings of Fact in support of its judgment based upon testimony before it from witnesses whose credibility the Court had an opportunity to observe.

3. Conflict with other decisions and provisions of the statutes.

The Court of Appeals held, as did the District Court, that Respondent was not entitled to damages and each Court observed that Respondent's counsel had so admitted. It was clearly error, therefore, for the Court of Appeals to remand the case for consideration of attorney fees since the only provision for the recovery of attorney fees is coupled with damages.[11] On the other hand, Title 15 U.S.C.A. Sec. 26, which permits a private party to bring suit for injunctive relief, makes no provision for the recovery of attorney fees.[12] In *Alden-Rochelle, Inc. v. American Soc. of Composers, Authors and Publishers*, S. D. New York 1948, 80 F. Supp. 888, in regard to attorney fees, the Court stated:

> "I have concluded that plaintiffs have not shown any injury from defendants' violations of the anti-trust laws and that, even if we presume injury, plaintiffs have not

[11]Title 15 U.S.C.A. § 15 is printed in Appendix A, p. A-3.

[12]Title 15 U.S.C.A. § 26 is printed in Appendix A, p. A-3.

> proved any thing from which the court could approximate the damages. It follows that plaintiffs are not entitled to a money judgment and therefore cannot be awarded 'a reasonable attorney's fee' under 15 U.S.C.A. § 15. 'The Court cannot properly award it except as an incident to the successful prosecution of a law action for recovery of damages based on a violation of the anti-trust laws.' Allen Bradley Co. v. Local No. 3, D.C., 51 F. Supp. 36 at page 40. In Decorative Stone Co. v. Building Trades Council, 2 Cir., 23 F. 2d 426, 428, it was held that 'the allowance of an attorney's fee * * * is incidental to the statutory right to damages, and was properly denied in the equity proceedings,' brought under 15 U.S.C.A. § 26. Even though plaintiffs have made out a case for equitable relief under 15 U.S.C.A. § 26 they may not recover 'a reasonable attorneys' fee' because they have failed to establish their claim for damages under 15 U.S.C.A. § 15."

Ring v. Spina, S.D. New York 1949, 84 F. Supp. 403, likewise holds that attorney fees are not allowed where no damages are proved.

The facts in this case are very different from the facts of the case on which the Court of Appeals relied in remanding this case to the District Court to examine whether or not Respondent is entitled to a reasonable attorney fee.[13] In this case, Respondent proved no damages. In said case relied on by the Court of Appeals the Plaintiff had a recovery of treble damages in the amount of $150,000.00 which, under 15 U.S.C.A. § 15, clearly entitled the Plaintiff in that case to attorney fees and but for which he would not have been entitled to attorney fees.

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[13]The Court of Appeals cited only one case as authority for further consideration of attorney fees, that being Poster Exchange, Inc. v. National Screen Service Corp., 5 Cir. 1970, 431 F. 2d 334, cert. denied 1971, 401 U.S. 912.

The harm arising from an injunction would far outweigh Respondent's interest in securing it. Respondent is not entitled to have the Court further consider injunctive relief in this case since he has not shown any damages to him, as distinguished from the public generally, and Respondent has used the injunctive relief for unfair competition in this case by selling merchandise at lower prices while the Petitioner was under a preliminary injunction. (Tr. p. 67).

> "The general objectives of the Patent Laws and the Anti-Trust Laws are the same. Both are intended to prevent unfair competition." *United States v. Parker-Rust-Proof Co.*, E.D. Michigan 1945, 61 F. Supp. 805, 812.

Respondent used the anti-trust laws in this case for the reverse of those purposes.

In the Court of Appeals' opinion, it is pointed out that Respondent's sales decreased by one-third (1/3). An examination of the record seems to indicate that the large decrease testified to by Respondent was in his "projected sales", not in his actual sales. Said testimony shows Respondent's actual gum sales for the period May 19 to June 18 were $1,982.00 (Tr. ln. 25, p. 233-ln. 49, p. 234). From June 19 to July 18, while Petitioner was forced by preliminary injunction to sell at pre-sale prices, Respondent's gum sales were $2,086.59, up only $103.72 from the period immediately preceding the injunction while the sale was in effect. The preliminary injunction was not granted until June 15, 1972, and the sale was on during the entire May 19-June 18 period, save and except for the last three days.

The substance of Respondent's complaint is that Petitioner should by injunction have a base below which it could not

sell its products while leaving Respondent free to reduce his prices below that base, as he did while the preliminary injunction was in force.

> "It may be said Congress did not put a floor under all existing prices so these could never be lowered by a firm doing interstate business. Certain economists contend for this construction. Such a situation would not be in the public interest. The people are interested in obtaining goods at the lowest price possible, if competition is not vitally affected thereby. The assumption suggested above would ring the death knell of competition." *Balian Ice Cream Co. v. Arden Farms Co.*, 231 F. 2d 356, 367.

As pointed out in footnote 7 hereof, the Petitioner's reduction in price exactly equaled the reduction it had received in its costs of goods from its supplier, which may even be specifically permitted under Title 15 U.S.C.A. Sec. 13(a), which provides, in part, that "* * * And provided further, That nothing herein contained shall prevent price changes from time to time wherein response to changing conditions affecting the market for or the marketability of the goods concerned * * *" The evidence was undisputed that the market for Petitioner's goods in the Houston and San Antonio areas had decreased.

Since Respondent showed no damages to himself or his business and there was no substantial lessening of competition, he, as an individual, is not entitled to seek injunctive relief.

> "An individual plaintiff is not entitled to sue by reason of violations resulting in injury to other persons or to the public. Correction of the latter evil is the function of the government alone." *Westor Theatres v. Warner Bros. Pictures*, D. New Jersey 1941, 41 F. Supp. 757, 763.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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Dallas, Texas 75201,

Attorney for Petitioners.

PROOF OF SERVICE

STATE OF TEXAS)
)
COUNTY OF DALLAS)

BEFORE ME, the undersigned Notary Public in and for Dallas County, Texas, on this day personally appeared EARL LUNA, who being by me duly sworn upon oath stated: I, EARL LUNA, am a member of the bar of the Supreme Court of the United States and have been the attorney of record for petitioners herein in all proceedings had in the Courts below.

I further state upon oath that upon the 20th day of July, 1973, I served copies of the foregoing Petition for Writ of Certiorari on the Respondent, Kenneth J. Hampton, d/b/a Hampton Vending Supply, by depositing the same in the United States Mail, with first class postage prepaid, addressed to the following counsel of record in the Courts below, at the address indicated, to-wit: Mr. James L. Branton, of Carter, Callender, Branton & Gonzalez, Suite 200, 140 Main Plaza, San Antonio, Texas 78205.

Earl Luna

SUBSCRIBED AND SWORN TO before me by the said EARL LUNA, this the 20th day of July, A. D. 1973.

Notary Public in and for
Dallas County, Texas

APPENDIX A

Title 15, U.S.C.A., Sec. 13(a) and (b).

§ 13. DISCRIMINATION IN PRICE, SERVICES, OR FACILITIES — PRICE; SELECTION OF CUSTOMERS

(a) It shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality, where either or any of the purchases involved in such discrimination are in commerce, where such commodities are sold for use, consumption, or resale within the United States or any Territory thereof, or the District of Columbia or any insular possession or other place under the jurisdiction of the United States, and where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them: *Provided*, That nothing herein contained shall prevent differentials which make only due allowance for differences in the cost of manufacture, sale, or delivery resulting from the differing methods or quantities in which such commodities are to such purchasers sold or delivered: *Provided, however*, That the Federal Trade Commission may, after due investigation and hearing to all interested parties, fix and establish quantity limits, and revise the same as it finds necessary, as to particular commodities or classes of commodities, where it finds that available purchasers in greater quantities are so few as to render differentials on account thereof unjustly discriminatory

or promotive of monopoly in any line of commerce; and the foregoing shall then not be construed to permit differentials based on differences in quantities greater than those so fixed and established: *And provided further,* That nothing herein contained shall prevent persons engaged in selling goods, wares, or merchandise in commerce from selecting their own customers in bona fide transactions and not in restraint of trade: *And provided further,* That nothing herein contained shall prevent price changes from time to time wherein response to changing conditions affecting the market for or the marketability of the goods concerned, such as but not limited to actual or imminent deterioration of perishable goods, obsolescence of seasonal goods, distress sales under court process, or sales in good faith in discontinuance of business in the goods concerned.

Burden of rebutting prima-facie case of discrimination

(b) Upon proof being made, at any hearing on a complaint under this section, that there has been discrimination in price or service or facilities furnished, the burden of rebutting the prima-facie case thus made by showing justification shall be upon the person charged with a violation of this section, and unless justification shall be affirmatively shown, the Commission is authorized to issue an order terminating the discrimination: *Provided, however,* That nothing herein contained shall prevent a seller rebutting the prima-facie case thus made by showing that his lower price or the furnishing of services or facilities to any purchaser or purchasers was made in good faith to meet an equally low price of a competitor, or the services or facilities furnished by a competitor.

Title 15 U.S.C.A. Sec. 15

§ 15. SUITS BY PERSONS INJURED; AMOUNT OF RECOVERY

Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee. Oct. 15, 1914, c. 323, § 4, 38 Stat 731.

Title 15 U.S.C.A. Sec. 26

§ 26. INJUNCTIVE RELIEF FOR PRIVATE PARTIES; EXCEPTION

Any person, firm, corporation, or association shall be entitled to sue for and have injunctive relief, in any court of the United States having jurisdiction over the parties, against threatened loss or damage by a violation of the antitrust laws, including sections 13, 14, 18 and 19 of this title, when and under the same conditions and principles as injunctive relief against threatened conduct that will cause loss or damage is granted by courts of equity, under the rules governing such proceedings, and upon the execution of proper bond against damages for an injunction improvidently granted and a showing that the danger of irreparable loss or damage is immediate, a preliminary injunction may issue: *Provided*, That nothing herein contained shall be construed to entitle any person, firm, corporation, or association, except the United States, to bring suit in equity for injunctive relief against any common carrier

subject to the provisions of the Act to regulate commerce, approved February fourth, eighteen hundred and eighty-seven, in respect of any matter subject to the regulation, supervision, or other jurisdiction of the Interstate Commerce Commission. Oct. 15, 1914, c. 323, § 16, 38 Stat. 737.

Rule 52(a), Federal Rules of Civil Procedure.

RULE 52. FINDINGS BY THE COURT

(a) Effect. In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon, and judgment shall be entered pursuant to Rule 58; and in granting or refusing interlocutory injunctions the court shall similarly set forth the findings of fact and conclusions of law which constitute the grounds of its action. Requests for findings are not necessary for purposes of review. Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses. The findings of a master, to the extent that the court adopts them, shall be considered as the findings of the court. If an opinion or memorandum of decision is filed, it will be sufficient if the findings of fact and conclusions of law appear therein. Findings of fact and conclusions of law are unnecessary on decisions of motions under Rules 12 or 56 or any other motion except as provided in Rule 41(b).

APPENDIX B

In the

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 72-3276

KENNETH J. HAMPTON, d/b/a
HAMPTON VENDING SUPPLY,
Plaintiff-Appellant,

v.

GRAFF VENDING COMPANY, FLOYD V. PRICE
AND HERBERT GOLDSTEIN,
Defendants-Appellees.

Appeal from the United States District Court for the Western District of Texas

(May 9, 1973)

Before TUTTLE, THORNBERRY and DYER, Circuit Judges.

DYER, Circuit Judge: Hampton brought this action under section 2(a) of the Clayton Act, as amended by the Robinson-Patman Act, 15 U.S.C.A. § 13(a),[1] claiming that Graff

[1] Section 13(a) provides in pertinent part:

(a) It shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality, where either or any of the purchases involved in such discrimination are in commerce where such commodities are sold for use, consumption, or resale within the United States or any Territory thereof or the District of Columbia or any insular possession or other place under the jurisdiction of the United States, and where the effect of such discrimination may be substantially to lessen

Vending Company had illegally lowered its prices in the San Antonio and Houston areas. The district court found that Graff's actions did not have the effect of substantially lessening competition, that they did not operate to discriminate against Hampton, and that Graff acted reasonably to meet competition; pursuant to these findings judgment was entered for Graff and Hampton appealed. Because we are of the view that Hampton successfully established a case of primary line price discrimination as to some of Graff's activities, we reverse.

I. Facts

The basic facts are essentially undisputed. Because the application here of the correct principles of law requires an understanding of the competitive situation, however, we must set out an accurate description of the market involved.

Both Hampton and Graff expended their profit making efforts in what is known as the bulk vending supply business. This business consists of the sale of ball gum and charms and of the sale of vending machines through which the gum and charms are sold to the public. The distributive channels for these products are not uniform throughout the industry, but frequently the items are sold by the manufacturer to a functional wholesaler, who in turn resells them to an operator who actually places and fills the machines at their retail locations in grocery stores, gas stations, etc. Additionally, certain wholesalers function partially as operators and certain large operators buy direct from some manufacturers.

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competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefits of such discrimination, or with customers of either of them. . . .

Graff, according to its own advertising, is the world's largest bulk vending distributor, with its home office in Dallas, Texas. It has outlets in many states and has several warehouses in Texas, including ones in San Antonio and Houston. Graff functions primarily as a wholesaler, but does operate some retail routes in other parts of the country and does own some retail routes in San Antonio.[2] The source of most of Graff's gum is W. R. Grace Company of Chicago, Illinois, which manufactures Leaf gum. Graff serves as the almost exclusive distributor of Leaf gum in Texas and purchases at list price less 19% and less some freight allowances.

Hampton's functional role is not as easily characterized and must be viewed, to some extent, historically. Since 1965 Hampton has been an operator of vending machines in the San Antonio area. Sometime in 1969 he became an employee of Graff and ran its San Antonio office, in addition to continuing his own business as an operator. At the end of 1970 Hampton quit working for Graff and added a wholesale element to his business, reselling some gum to other operators. From early 1971 to the present, Hampton has maintained this functional stance, working primarily in the San Antonio-south-Texas area with occasional sales to other parts of Texas and to other states.

The heart of this controversy concerns Hampton's source of gum and the price paid for it. When Hampton left Graff's employ and began wholesaling as well as operating, he purchased his gum through his father, who had a large volume

[2] Although Graff had operated some routes in San Antonio 2 or 3 years prior to this suit, it now just owns the master contract with several grocery store chains in the city; other people, who purchase supplies from Graff, actually work these routes.

contract with Graff. Under this contract Hampton's father purchased Leaf gum from Graff at list price less 10% and he passed this price on directly to his son. Hampton in turn used some of this gum on his own routes and resold the rest to various operators at list.

During 1971 and into the first months of 1972, while Hampton was functioning both as an operator and a wholesaler, Graff experienced a steady decrease in sales in the San Antonio and Houston areas. In February 1972, in the midst of these decreased sales Graff's contract with Hampton's father came up for renegotiation and Graff decreased the discount it would offer on Leaf gum from 10% to 8%. Hampton's father would not purchase from Graff at this rate and the contractual relationship, and Hampton's source of gum, terminated on May 15, 1972. Efforts by Hampton to negotiate a satisfactory contract with Graff directly also failed.

With his source of Leaf gum becoming less attractive Hampton looked elsewhere for gum and contacted American Gum Company. This led to his placing a 1000 case order with American at a price of list less 17% and freight allowances. Because the list prices for American and Leaf gums were approximately equal this price constituted a substantial savings over the price he previously paid to Graff via his father.[3]

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[3] From the record, the following is an example of the per case price that Hampton paid to Graff prior to May 15, 1972, and to American after that date.

Gum	*Mfg's list, No. 933 ball gum*	*Hampton's Cost*
Leaf*	$ 9.70**	$8.73 (list less 10%)
American*	$10.15	$7.73 (list less 17% and frt.)

Shortly after Hampton contracted with American, Graff implemented a previously arranged sale on Leaf gum[4] for all sales out of its San Antonio and Houston offices. This sale was supported by Leaf who had been asked for help in these two marketing areas[5] and who had agreed to lower prices to Graff by $1.50 per case on some gum and by $.90 per case on other gum if Graff would pass the savings along. The resulting price at which Graff would sell to anyone, including small operators, was approximately equal to the price American charged Hampton. Correspondingly, Hampton's resale price to operators was now considerably higher than Graff's resale price to operators.[6]

The impact of Graff's new price structure was almost immediate. Its sales recovered sharply from their year and one-

*The per case price is not exactly comparable because a Leaf case has a 5550 count and an American case has a 5670 count.

**The list price of one case of Leaf No. 933 ball gum increased from $9.40 to $9.70 on March 15, 1972. Other Leaf products increased in price at the same time.

[4] Hampton's complaint alleged that Graff had cut its prices in all areas of sales — gum, charms, and machines. It is clear from the record, however, that he only adduced evidence concerning alleged price discriminations with respect to Leaf gum. Consequently, it is on this ground alone that Hampton must prevail, if at all.

[5] Graff asked for these price reductions only for San Antonio and Houston, despite the fact that it was experiencing decreased sales in at least several other major marketing areas.

[6] The following is an example of the prices available to a small operator in San Antonio after the beginning of Graff's sale.

Case of No. 933 Ball Gum

Seller	*List*	*Discount*	*Costs*	*Price*
Graff/Leaf	$ 9.70	1.50 + 19% + frt.	$5.95	$8.20
Hampton/American	$10.15	17% + frt.	$7.73	$9.74*

*Hampton sold a case of American No. 933 ball gum at below list to make the gum more competitive with Leaf gum from Graff, which had been sold at list price prior to the sale in question.

half slide and Hampton's sales dropped from previous months. Hampton then filed this suit.

II. The Court Below

Hampton's argument below was tied completely to his status as a wholesaler and a direct competitor of Graff. As a result, he attempted to show a case of primary line discrimination.[7] Graff, on the other hand, seemed to prefer to view the case as a secondary line case, and then in turn met this argument with the assertion that its lower prices were available to everyone, including Hampton. In the alternative it argued that its lower prices were justified as a good faith effort to meet competition (said to be that of American) and to regain Hampton and others as customers.

The district court, faced with a complex case involving businesses functioning at more than one level of distribution, framed its findings of fact and conclusions of law in terms of a secondary line case and entered judgment for Graff. While we feel that some of Graff's contentions have merit, we conclude that they must be reevaluated in light of Hampton's primary line argument.

III. Prima Facie Case of Primary Discrimination

The presence of most of the requisite elements in Hampton's case was not questioned below and has not been ques-

[7] An injury to the primary line of commerce is one that affects competition among sellers. It was the subject of the first federal statute dealing exclusively with price discrimination and is still covered by the Robinson-Patman Act. *See FTC v. Anheuser-Busch, Inc.*, 1960, 363 U.S. 536, 542-43. It differs from secondary line price discrimination in which competition is usually affected because some customers of a seller do not receive prices as low as certain "favored" customers.

tioned here. Three elements, however, merit our attention — Hampton's status as a functional competitor, the existence of price discrimination, and the effect on competition.

Hampton's role as a competitor wholesaler is obscured by two other relationships he had with the San Antonio market. First, until just prior to this suit, he had been a customer of Graff. Nevertheless, that position does not bar him now from asserting rights incident to his functional position. In fact, the record clearly shows that even when he was a customer of Graff, he was able to compete successfully with Graff for wholesale business. Furthermore, in his current position, he is a completely independent competitor.

The second relationship Hampton has with the current market that belies his status as a wholesaler is his continuing business as an operator. Graff has not suggested that this in any way bars Hampton from suing as a wholesaler and the fact that 90% of Hampton's business is wholesale indicates that this is his true position in the distributive scheme. We, therefore, consider him to be a functional competitor of Graff.

The occurrence of price discrimination is more easily discerned. Graff readily admitted that it requested support from Leaf for its price cut only for the San Antonio and Houston areas. It its offices throughout the remainder of Texas and in other states, Leaf gum continued to be sold at list price. The fact that within these two Texas markets the prices were the same to all customers is irrelevant. "[A] price discrimination within the meaning of [section 2(a)] is merely a price difference," *FTC v. Anheuser-Busch, Inc.*, 1960, 363 U.S. 536, 549,

and Hampton has shown and Graff has admitted a geographic price difference.

The final element about which there could be a question is whether the effect of Graff's actions "may be to substantially lessen competition." In considering this, we are first met with the district court's finding that the sale "would not" have that effect. This finding, however, is not entitled to the mantle of protection normally afforded district court findings under Rule 52(a), Fed. R. Civ. P., because the court's findings had obvious reference to a case of secondary line discrimination. While we have no quarrel with the finding in that context, it is in no way binding on us when the case is properly construed as primary line discrimination. *See Schultz v. First Victoria National Bank*, 5 Cir. 1969, 420 F. 2d 648. *See also United States v. Singer Mannufacturing Co.*, 1963, 374 U.S. 174, 194 n. 9; *Manning v. M/V "Sea Road"*, 5 Cir. 1969, 417 F. 2d 603.

When the discrimination alleged here is evaluated at the wholesale level the deleterious impact on competition becomes apparent. This is exemplified by Hampton's personal situation. Before Graff's sale, for example, he was able to purchase his No. 933 gum from American at $7.73 per case and was selling it at $9.74. Graff's corresponding figures were $7.40 and $9.70. Given some difference in the quantity in each case (*see* footnote 2), the prices were roughly comparable, and this resulted in a competitive market based largely on the quality of the wholesaler's service.

This relationship was shattered when Graff requested and received an additional discount of up to $1.50 per case, which, allowed it to purchase an identical case of No. 933 Leaf gum

at $5.95 and to sell it at $8.20.[8] To meet this price Hampton, or any other competing wholesaler, would have to lower his resale price almost to the level of his cost of acquisition. In Hampton's position that would reduce gross income before costs to approximately $.50 per case.[9] From the testimony of Graff's director of sales and marketing it is apparent that no wholesaler could continue to compete with only that amount of markup.[10]

Although the above comparison was made only between Hampton's and Graff's prices, we are not unaware that the Robinson-Patman Act is concerned primarily with possible injury to *competition* and not to *competitors. See Borden Co. v. FTC*, 5 Cir. 1967, 381 F. 2d 175. Our review of the record, however, reveals no existing, or potential, wholesale competitor in the San Antonio area who was able to compete, or would be able to compete, with Graff's sale prices. Certainly, no whole-

[8] The facts of this case differ from those of several other primary line cases in that the geographic price difference here was not absorbed by the discriminator, but was underwritten by the manufacturer at the discriminator's request. This has not been raised as a distinguishing factor and, where a large national wholesaler is able to request and receive this kind of preferential treatment, the potential force of any such argument is lost.

[9] There is some indication in the record that, on many sales, Hampton's gross income would be still less. According to Hampton's trial brief, in addition to overhead expenses, he has to pay the freight on his shipments to non-local customers while Graff does not. This one item, claims Hampton, increases his cost on over one-half of his delivered cases of No. 933 American gum from $7.73 to $8.18 a case.

[10] Mr. Goldstein stated that Graff could not maintain the sale price ($8.20 per case on No. 933 gum) if it were required to revert to its old price schedule from Leaf ($7.40 per case); this would yield a maximum of $.80 per case, and, with other costs and overhead included, would allow no more than a few cents profit on a case. According to Mr. Goldstein, such a profit level is insufficient to support a continuing wholesale business.

saler purchasing from Graff could hope to resell at a profit because Graff offered the sale price to everyone and granted no discounts whatsoever off that price. Similarly, the evidence indicates that American had no instituted price system to match Graff's price on Leaf gum and thus no wholesaler could compete by purchasing from that source. Leaf also was unavailable as a direct source of reduced price gum because Graff received a very special concession for this sale and because Graff had a virtually exclusive distributorship of Leaf products in Texas. Finally, although other companies manufacture comparable gum, the evidence indicated no substantial competitive activity by them in the San Antonio area before the sale, much less during it.

Consequently, we are confronted with a wholesale gum market in which, immediately following the price cut, Graff increased its market share by as much as 50% and Hampton's share dropped approximately 39%. Therefore, with no definable end for the sale in question and with no viable wholesale competitor in the area, we conclude after a careful review of the record that there is both a reasonable possibility, and a reasonable probability,[11] that the effect of Graff's reduced prices on Leaf gum products may be to substantially lessen competition.

IV. Defense Against Prima Facie Price Discrimination Case

The showing that Hampton was Graff's functional competitor, that price discrimination occurred, and that it resulted in the

[11] *Compare FTC v. Morton Salt Co.*, 1948, 334 U.S. 37, *and Borden Co., supra, with Foremost Dairies, Inc. v. FTC*, 5 Cir. 1965, 348 F. 2d 674, 680 n. 11, *cert. denied*, 382 U.S. 959.

prescribed effect on competition does not constitute an irrebuttable violation of the Robinson-Patman Act. Instead, the Act allows a person against whom a prima facie case has been established to justify his actions by raising any of three affirmative defenses built into the Act itself. The chief defensive effort by Graff that retains any validity in a primary line case[12] is aimed at the so-called "good faith meeting competition defense" incorporated in section 2(b) of the Act.[13]

The section 2(b) defense, if proved, does constitute an absolute defense to a prima facie price discrimination case, regardless of the anti-competitive effect shown to exist. *Jones v. Borden Co.*, 5 Cir. 1970, 430 F. 2d 568. The burden of proving the defense, however, is squarely on the price discriminator, *see Surprise Brassiere Co. v. FTC*, 5 Cir. 1969, 406 F. 2d 711, and it is a burden that is not easily met. For Graff to prevail on this point the record must at least demonstrate "the existence of facts which would lead a reasonable and prudent person to believe that the granting of a lower

[12]Based on the findings of the district court, Graff has continued to assert that no discrimination occurred because the sale price was available to Hampton. This secondary line argument carries no weight in a primary line case.

[13]Section 2(b) of the Act, 15 U.S.C.A. § 13(b) provides:

> Upon proof being made, at any hearing on a complaint under this section, that there has been discrimination in price or services or facilities furnished, the burden of rebutting the prima-facie case thus made by showing justification shall be upon the person charged with a violation of this section, and unless justification shall be affirmatively shown, the Commission is authorized to issue an order terminating the discrimination: *Provided, however,* That nothing herein contained shall prevent a seller rebutting the prima-facie case thus made by showing that his lower price or the furnishing of services or facilities to any purchaser or purchasers was made in good faith to meet an equally low price of a competitor, or the services or facilities furnished by a competitor.

price would in fact meet the equally low price of a competitor." *FTC v. A. E. Staley Manufacturing Co.*, 1945, 324 U.S. 746, 759-60. *See Callaway Mills Co. v. FTC*, 5 Cir. 1966, 362 F. 2d 435.

Perhaps the most fundamental element of the defense is that the price met must be that of a competitor. In a primary line case such as this, it would be reasonable then for Graff to try to show that Hampton's prices, or those of some other wholesaler, were lower than its own and that it tried to match them. For the period from January 1971 to May 15, 1972, Graff has failed to do this. During that time Hampton purchased from Graff and resold at exactly the same price that Graff sold directly to operators. No other wholesaler was shown to have sold at a lower price during this period.

After May 15, 1972, Graff has at least shown that, among local wholesalers, Hampton sold American gum at a price somewhat below Graff's price for Leaf gum. This small difference, however, attributable to more gum balls being packed in an American case than in a Leaf case, is completely insufficient to justify price cuts of $1.50 and $.90 for certain kinds of Leaf gum.[14]

Therefore, most of Graff's effort at establishing a competitive relationship for section 2(b) purposes was not directed at San Antonio wholesalers, but at American itself. As unusual as this approach is in a primary line case, it is not without merit.

[14]For example, Hampton sold a 5670 count case of No. 933 American gum for $9.74. At that price level, Graff would have been justified in lowering the price, to operators, on its 5550 count case from $9.70 to $9.53 — a total of $.17. Even when some amount is added for a reasonable uncertainty over Hampton's exact prices in a competitive situation the technically allowed cut of $.17 cannot grow to $1.50.

The reason is that although Hampton did compete with Graff as a wholesaler throughout this period, he had also been a substantial customer of Graff until May 1972. As such, it would be unreasonable for us to bar Graff completely from using the 2(b) defense in this special situation where a former customer had been induced away by a manufacturer otherwise competing with Graff's supplier.

The competitive relationship thus established is merely the first step in claiming the protection of this defense. Graff is still required to prove that its prices, within reasonable limits, were just low enough to meet but not beat the competitive price. *Jones, supra,* 430 F. 2d at 573; *Callaway, supra.* In this respect, as we demonstrate hereinafter, Graff has failed to show a good faith effort to meet American's prices.

It is clear from the record that Hampton purchased gum from American at list less 17%. This fact alone does not justify the sweeping price cuts on Leaf products to all purchasers, however. Graff has shown no other sales by American to San Antonio purchasers at prices below Leaf's list price and no sales, other than American's to Hampton, at anything approaching $1.50 off the list price on a case of gum. Despite the absolute lack of such evidence, Graff now claims that it was justified in offering the reduced prices to all purchasers in San Antonio, large or small, wholesaler or operator. We conclude that this was an unreasonable competitive tactic.

Although the exact details of American's pricing schedule are not before us, it is beyond question that Hampton was able

[15]Hampton testified that he was required to place a 100 case in order to get the 17% discount plus freight.

to receive his 17% discount only because he made a large volume order. This quantity discount approach was not foreign to the industry; both Graff's director of sales and marketing and its San Antonio area representative testified that they knew American would only sell at a discount similar to Hampton's if the purchaser made a volume purchase of upwards to 20-25 cases.[15] Nevertheless, possessing a generally accurate picture of its competitor's sales policy and well aware that it itself only gave discounts to volume purchasing accounts, Graff lowered its prices to approximately the level Hampton got from American and then offered these prices to all, including the smallest operator able to purchase only one case at a time.

To suggest that such a sales policy was a good faith, reasonable effort to meet competition is unthinkable. Graff, who might have engineered a carefully drawn sales campaign to regain the business of Hampton and perhaps any other customers lost to American, instead resorted to a severe price cut which, contrary to the normal practice in the industry, gave to the small operator the price offered by American only to quantity purchasers. *See FTC v. Standard Brands, Inc.*, 2 Cir. 1951, 189 F. 2d 510. We conclude that Graff has not established a good faith meeting competition defense within the meaning of section 2(b) of the Robinson-Patman Act.[16]

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[16]The district court's findings to the effect that Graff's sale was a reasonable way to meet competition and that Graff's prices were not unreasonably low are not binding on us when the case is properly viewed as a primary line discrimination. Furthermore, because Graff has failed to prove a 2(b) defense, we need not consider whether Graff's price cuts were a proper response to individual competition situations, or whether the new price structure was an illegal plan or system for meeting competition. *Compare Callaway, supra, with Surprise, supra.*

V. Available Relief

In his original complaint, Hampton requested damages, costs, a reasonable attorney's fee, a preliminary injunction and "such other and further relief as is just." After obtaining a preliminary injunction, he was denied all requested relief including a permanent injunction. Because we have found that he proved a prima facie case and that Graff did not successfully establish a 2(b) defense, we must consider what relief is now appropriate.

Hampton's counsel at oral argument urged that we remand the case so that the district court could receive further evidence on damages; in the alternative he urged that the case be remanded so that the district court could make a finding on damages based on the record as it presently stands.

Because the proceeding below was a full hearing on the merits, Hampton's first position is utterly without merit. His second position is also untenable. Near the close of the hearing the following exchange occurred between the court and Hampton's counsel.

> THE COURT: I don't think there is any proof of loss, as to the amount of loss of damages or earnings at this time. Now, it may be that before Mr. Branton rests, there will be. But at present time I don't think he has established any damages. Have you, Mr. Branton? I haven't heard any figures mentioned.
>
> MR. BRANTON: I don't think I have. I think we have established that he has suffered a loss and that there is a decline in his business, but there is no—
>
> THE COURT: But there is no evidence. I haven't heard any figures mentioned or anything. I think we are prolonging this thing.

Hampton thereafter introduced no further evidence and has not demonstrated to this court any compelling reason, in the record or otherwise, for us to ignore his admission. Hampton must have felt that his proof had failed to nail down clearly ascertainable damages or that it was impossible to place a dollar value on them. Since upon a full trial there was a failure of proof of actual damages, that is the end of the matter.

That there is no entitlement to damages, however, is not dispositive of the question of permanent injunctive relief. Authorized under 15 U.S.C.A. § 26, a permanent injunction can be issued by a federal district court exercising equitable jurisdiction because it has "broad power to restrain acts which are of the same type or class as unlawful acts which the court has found to have been committed or whose commission in the future, unless enjoined, may fairly be anticipated from the defendant's conduct in the past." *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 1969, 395 U.S. 100, 132, *quoting NLRB v. Express Publishing Co.*, 1941, 312 U.S. 426, 435. In the present posture of this case, however, the initial determinations of whether an injunction should issue, and what its scope should be if issued, are peculiarly within the competence of the district court and we intimate no predisposition on either question. We, therefore, remand this aspect of the case for a reevaluation of the record with respect to possible injunctive relief.

The final relief prayed for was a reasonable attorney's fee and costs, in accordance with 15 U.S.C.A. § 15. Such relief is addressed to the sound discretion of the district court and, under the facts of this case, we think it appropriate for that court to examine the question first. *See Poster Exchange, Inc. v.*

National Screen Service Corp., 5 Cir. 1970, 431 F. 2d 334, *cert denied*, 1971, 401 U.S. 912.

We reverse and remand for further proceedings not inconsistent with this opinion.

REVERSED AND REMANDED.

APPENDIX C

In The

United States Court of Appeals

FOR THE FIFTH CIRCUIT

OCTOBER TERM, 1972

No. 72-3276

D. C. Docket No. SA 72 CA 198

KENNETH J. HAMPTON,
d/b/a HAMPTON VENDING SUPPLY,
Plaintiff-Appellant,

v.

GRAFF VENDING COMPANY, et al.,
Defendants-Appellees.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

Before TUTTLE, THORNBERRY and DYER, Circuit Judges.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Western District of Texas, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, reversed; and that this cause be, and the same is hereby remanded to the

said District Court not inconsistent with the opinion of this Court;

It is further ordered that defendants-appellees pay to plaintiff-appellant, the costs on appeal to be taxed by the Clerk of this Court.

May 9, 1973

Issued as Mandate:

APPENDIX D

In the

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 72-3276

KENNETH J. HAMPTON,
d/b/a HAMPTON VENDING SUPPLY,
Plaintiff-Appellant,

v.

GRAFF VENDING COMPANY, et al.,
Defendants-Appellees.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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ON PETITION FOR REHEARING

(JUNE 11, 1973)

Before TUTTLE, THORNBERRY and DYER, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby denied.

APPENDIX E

In The

District Court of The United States

FOR THE WESTERN DISTRICT OF TEXAS

SAN ANTONIO DIVISION

Civil Action No. SA-72-CA-198

KENNETH J. HAMPTON,
d/b/a HAMPTON VENDING SUPPLY,

v.

GRAFF VENDING COMPANY, et al.,

FINAL JUDGMENT

On the 19th day of July, 1972 came the parties in person and by and through their Attorneys of Record and announced ready for trial. The Court, after reading all the pleadings filed herein, including the Plaintiff's Original Complaint, the Defendants' Original Answer, the First Amended Motion to Hold Defendants in Contempt for Breach of Injunction and Defendant's First Trial Amendment, and after hearing all the evidence adduced on the trial and the arguments of counsel, is of the opinion and finds that the law and the facts are with the defendants in this case and that plaintiff's Motion to Hold Defendants in Contempt should be in all things denied; that the Preliminary Injunction heretofore issued against the defendants should be in all things dissolved and that plaintiff's prayer

for a Permanent Injunction, damages, attorneys' fees and costs of Court should be in all things likewise DENIED.

It is, therefore, accordingly ORDERED, ADJUDGED AND DECREED by the Court that plaintiff's Motion to Hold Defendants in Contempt is DENIED; that the Preliminary Injunction heretofore issued in this cause against defendants is DISSOLVED, and that plaintiff's prayer for additional injunctive relief, including a Permanent Injunction, along with plaintiff's prayer for damages, attorneys' fees and costs is DENIED. It is FURTHER ORDERED, ADJUDGED AND DECREED that plaintiff recover nothing of and from the defendants by virtue of this suit and that defendants recover all costs of Court herein incurred, for which defendants may have their execution.

The Court further reserves the right to file additional Findings of Fact and Conclusions of Law herein.

SIGNED AND ENTERED this 20th day of July, 1972, at San Antonio, Texas.

JOHN H. WOOD, JR.

United States District Judge

APPENDIX F

In The

District Court of The United States

SAN ANTONIO DIVISION

Civil Action No. SA-72-CA-198

KENNETH J. HAMPTON,
d/b/a HAMPTON VENDING SUPPLY,

v.

GRAFF VENDING COMPANY, et al.,

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Judgment having been entered on the 20th day of July, A. D. 1972, and the Court having reserved the right in said Judgment to make additional Findings of Fact and Conclusions of Law and, in accordance therewith, the Court does make the following Findings of Fact and Conclusions of Law

FINDINGS OF FACT

1. Graff Vending Company experienced a decrease in sales in 1971 and 1972 prior to the sale in the Houston and San Antonio areas.

2. In 1972 Graff Vending Company increased prices on some of its products prior to the sale and experienced further decreases in business in the Houston and San Antonio offices.

3. In April of 1972 two meetings were held between Graff

Vending Company representatives and representatives of Leaf Gum Company, Graff's supplier of a portion of the products it sells.

4. The purpose of the meetings was to consider meeting competition in the Houston and San Antonio offices in order to regain customers and sales which it had lost in said offices and to keep from losing other customers and sales.

5. Leaf agreed to give a price reduction to Graff on certain products to be sold in the Houston and San Antonio offices.

6. Graff agreed to put on a sale in the Houston and San Antonio office and pass the price reduction along to the customers.

7. The sale was a reasonable way for Graff Vending Company to meet competition.

8. The sale had the result of increasing sales volume.

9. Leaf Gum, which was sold by Graff Vending Company, generally sold at a price that was higher than that of its competitors' price prior to the sale.

10. Graff Vending Company and its manufacturer, Leaf, intended that customers who bought Leaf chewing gum at the sales price would learn of its value and would continue to purchase Leaf gum because of its higher quality at an increased price after the sale had ended.

11. The sale put on in the San Antonio and Houston office would not have the effect of substantially lessening competition.

12. The plaintiff, Kenneth J. Hampton, d/b/a Hampton Vending Supply, had previously purchased chewing gum and

other products either directly or indirectly through Graff Vending Company.

13. Plaintiff Kenneth J. Hampton, d/b/a Hampton Vending Supply, could have bought products from the defendant Graff Vending Company at the sales price in San Antonio as any other firm could do.

14. Graff Vending Company never refused to sell merchandise to the plaintiff and continues to be desirous of selling merchandise to the plaintiff at the same price it sells to other San Antonio office customers.

15. The plaintiff did not offer proof that the defendant had discriminated against plaintiff on the basis of price.

16. The plaintiff has not purchased merchandise from the defendant or attempted to purchase merchandise from the defendant during the defendant's sale.

17. At the time Frank B. Van Zandt purchased merchandise from the defendant, as mentioned in his affidavit attached to Plaintiff's Motion for Contempt, the preliminary injunction in this case was not in effect.

18. The defendants did not violate this Court's order.

19. Under the terms of the preliminary injunction issued in this cause, the defendants were required to sell the Selectorama Vending Machine at a price not less than $192.50 in its San Antonio office, that being the price for which the defendants sold said machine prior to May, 1972.

20. During the time the preliminary injunction so required the defendants to sell said machine for $192.50, the plaintiff sold at least two of such machines for $156.00 each.

21. The defendants were not selling merchandise at unreasonably low prices during the sale.

22. The defendants were not selling merchandise at prices below cost during the sale.

23. After the preliminary injunction was entered herein and during the time said injunction was in effect, defendants' sales decreased because the defendant was unable to meet lower prices of its competitors.

24. The defendant Graff Vending Company should be permitted to meet competition by putting on a sale such as it did in May of 1972 or through any other avenue of competition which does not violate the anti-trust laws or some other applicable statute of this State or Nation.

CONCLUSIONS OF LAW

1. As between plaintiff and defendant in this case, there was no price discrimination.

2. The sale which Graff Vending Company put on in May of 1972 did not have the effect of substantially lessening competition.

3. The May, 1972, sale of Graff Vending Company did not have the effect and could not reasonably be expected to have the effect of creating a monopoly for the defendant.

4. The May, 1972, sale of Graff Vending Company does not violate the anti-trust laws.

5. The May, 1972, sale of Graff Vending Company was a reasonable way for the defendant to meet competition.

6. The anti-trust laws do not prevent the defendant from

recouping business lost to competitors by reducing prices and engaging in retaliatory sales campaigns to effect such recoupment.

7. Neither of the defendants violated the order of this Court.

8. Neither of the defendants are in contempt of Court.

GENERAL STATEMENT

Parties in an anti-trust action, such as the case now before the Court, must be ever-mindful of the theory and public policy to which the relevant statutes and case law is anchored.

Historically, the oppressive cartels, pools and monopolies formed at the turn of the century grew to such mammoth size and strength that the plaintiff outcry of a disadvantaged public was echoed in the halls of Congress. Congress answered with the passage of the Clayton and Sherman Anti-Trust Acts.

Since that time, Congress and the Courts of this Land have been the omnipresent watchdogs preserving the free-enterprise system lest the greed and avarice of a few again subvert the rights of the majority.

Thus the statutory scheme of both State and Federal anti-trust law is to prevent the restraint of trade to the injury of the public. Monopolies are odious and inimical to public welfare and against public policy. Conversely, competition is the antithesis of monopoly — the life's blood of trade.

In many cases it is seldom easy to distinguish competition from the actual restraint of trade, and the grey areas in fact and in law are not readily discernible. Courts must not attempt to stiffle the competitive aspect of our system which inures to the public benefit, nor apply equity and law to the point of

rendering free-enterprise impotent. Therefore, in applying the letter and spirit of the law, and for the reasons set out in this Order, the judgment must be entered in favor of the defendant.

ENTERED this 10th day of August, 1972, at San Antonio, Texas.

JOHN H. WOOD, JR.

United States District Judge

A true copy of the original, I certify,

DAN W. BENEDICT, Clerk

By: Mary Kirk, Deputy.

FILE COPY

Supreme Court, U. S.
FILED
AUG. 22,
1973
MICHAEL RODAK, JR., CLERK

No. 73-167

In the

Supreme Court of The United States

OCTOBER TERM, 1973

GRAFF VENDING COMPANY, ET AL.,

Petitioners

vs.

KENNETH J. HAMPTON,
d/b/a HAMPTON VENDING SUPPLY,

Respondent.

REPLY TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

JAMES L. BRANTON
Suite 200, 140 Main Plaza
San Antonio, Texas, 78205
Attorney for Respondent

In The

Supreme Court of The United States

OCTOBER TERM, 1972

No. .....

GRAFF VENDING COMPANY, ET AL.,

Petitioners,

vs.

KENNETH J. HAMPTON
d/b/a HAMPTON VENDING SUPPLY,

Respondent.

REPLY TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

As stated by the Fifth Circuit Court of Appeals, the basic facts of the case are essentially undisputed. (Appendix B-3 of Petition for Writ of Certiorari).

The Trial Court's findings of fact are framed in terms that clearly considered the case as a secondary line competition case. Hampton's position was, and the facts conclusively establish,

that he was a wholesaler and a direct competitor of Graff. When viewed on the basis of primary line competition, the Trial Court's findings of fact become erroneous.

The Fifth Circuit Court of Appeals considered Hampton to be a functional competitor of Graff, and further considered that the Trial Court had framed its findings of fact on the basis of a secondary line competition case. In view of the Appellate Court's holding that the Trial Court erred in construing it as a secondary line competition case, it would be incongruous for the Appellate Court to be bound by the Trial Court's findings of fact. In such case, the Trial Court's findings of fact would be clearly erroneous. It was not a matter of weighing the evidence or the credibility of the witnesses, but rather applying the law to essentially undisputed facts.

A reading of the Trial Court's findings of fact can only lead to the conclusion that the Trial Court made the findings on the premise that Graff's competitor was not Hampton but rather American Gum. This is clearly erroneous under the record. When viewed as a primary line competition case between Graff and Hampton, the Trial Court's findings of fact are clearly erroneous and accordingly there is no conflict between the Fifth Circuit's decision in this case and the decisions of this Honorable Court or the other Courts of Appeal, which have been cited by Petitioner.

The Petition for Writ of Certiorari should be denied for the following reasons:

(1) The Fifth Circuit Court of Appeals has in no way de-

parted from the basic rule regarding findings of fact as set out in Rule 52a of the Federal Rules of Civil Procedure.

(2) The cases cited by Petitioner on the points raised are not in conflict with the decisions of this Court or with the decisions of other Courts of Appeal.

(3) There are no special nor important reasons advanced by Petitioner which would bring himself within the scope and intent of Rule 19 of the U. S. Supreme Court Rules.

It is, therefore, respectfully submitted that the Petition for a Writ of Certiorari should be denied.

Carter, Callender, Branton & Gonzalez
Suite 200, 140 Main Plaza
San Antonio, Texas, 78205

By:_____
James L. Branton

ATTORNEYS FOR RESPONDENT

CERTIFICATE OF SERVICE

STATE OF TEXAS §
§
COUNTY OF BEXAR §

BEFORE ME, the undersigned Notary Public in and for Bexar County, Texas, on this day personally appeared JAMES L. BRANTON, who being by me duly sworn upon oath stated: I, JAMES L. BRANTON, am a member of the Bar of the Supreme Court of the United States and have been the attorney of record for Respondent in all proceedings had in the Courts below.

I further state upon oath that on the _____ day of August, 1973, I served copies of the foregoing Reply to Petition for Writ of Certiorari on the Petitioners, Graff Vending Company, Et Al., by depositing the same in the United States Mail, with first class postage prepaid, addressed to the following counsel of record in the Courts below, at the address indicated, to-wit: Mr. Earl Luna, 1002 Dallas Federal Savings Building, Dallas, Texas, 75201.

_____
James L. Branton

SUBSCRIBED and SWORN TO before me by the said JAMES L. BRANTON, this_____ day of August, 1973.

_____
Notary Public in and for Bexar
County, Texas

FILED
NOV 1 1973
MICHAEL RODAK, JR., CLERK

In the

Supreme Court of The United States

OCTOBER TERM, 1972

No. 73-167

GRAFF VENDING COMPANY, et al.,

Petitioners,

v.

KENNETH J. HAMPTON,
d/b/a HAMPTON VENDING SUPPLY,

Respondent.

PETITION FOR REHEARING OF ORDER DENYING CERTIORARI

EARL LUNA,
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Dallas, Texas 75201,
Attorney for Petitioners.

SOUTHWESTERN LAW PRESS — DALLAS, TEXAS — (214) 742-4257

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OCTOBER TERM, 1972

No. 73-167

GRAFF VENDING COMPANY, et al.,
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v.

KENNETH J. HAMPTON,
d/b/a HAMPTON VENDING SUPPLY,
Respondent.

PETITION FOR REHEARING OF ORDER DENYING CERTIORARI

Petitioners respectfully request that this Court grant rehearing of its order dated October 9, 1973, which denied certiorari, and that the Court now grant certiorari.

The petition for certiorari previously filed herein presented the following questions:

1. Whether the Court of Appeals, on appeal from a judgment on the merits by the District Court, rightly held that the District Court tried the case on the wrong theory and,

therefore, the Court of Appeals was not bound by the District Court's Findings of Fact.

2. Whether the Court of Appeals properly disregarded the Findings of Fact of the District Court where the Findings were not shown to be clearly erroneous as provided in Rule 52(a), F.R.C.P., 28 U.S.C.A.

3. Whether the Court of Appeals should reverse and remand this cause to the District Court for further consideration of injunctive relief and attorney fees where Respondent admitted, through his attorney, that he had suffered no monetary damages and failed to prove monetary damages.

The Petition for Certiorari did not raise the question of subject matter jurisdiction. An en banc decision has been handed down by the Fifth Circuit since the Petition for Certiorari was filed in this case which bears directly on the question of jurisdiction of the subject matter. In *Littlejohn v. Shell Oil Co.*, CCH, 1973-2 Trade Cases, paragraph 74,645, the en banc decision held requirement that for an action to be maintainable under the Robinson-Patman Act the Plaintiff must demonstrate that the discriminatory sales were "in commerce". That is, at least one of the two transactions, which when compared generate a discrimination, must cross a state line. This decision overruled a prior decision of a panel of the Fifth Circuit, *Littlejohn v. Shell Oil Co.*, 456 F. 2d 225 (5th Cir. 1972), which permitted an exception to the above stated requirement allowing an action on the basis of a discriminator using profits from interstate activities to underwrite losses sustained in driving

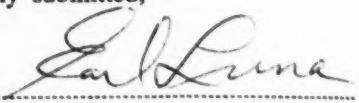
a competitor out of business through local price cutting. It has also been recently held that the requirement to show that at least one transaction violating the Robinson-Patman Act has occurred in interstate commerce is applicable to primary discrimination cases, as well as secondary discrimination cases. *Lucky Breweries, Inc. v. Theo. Hamm Co.*, CCH 1973-72 Trade Cases, paragraph 74,592 (N.D. Cal. 1973). In the instant case, plaintiff presented evidence of sales made by defendants, one in Dallas, Texas, and two in San Antonio, Texas, to support his claim of geographic price discrimination, all three transactions being in intrastate commerce. See pages 21-23 of the Transcript for Hearing on Preliminary Injunction and Plaintiff's Exhibits 1, 2 and 3 offered at that hearing. Hence, Plaintiff has failed to establish that at least one of the offending transactions took place in interstate commerce as required in the *Littlejohn* en banc decision to establish subject matter jurisdiction. Parties cannot waive lack of jurisdiction by failure to raise the issue in lower Courts. *Mitchell v. Maurer*, 293 U.S. 237 (1934). Indeed the Court, whether Trial or Appellate, is obliged to notice want of jurisdiction on its own motion. *American Fire & Cas. Co. v. Finn*, 341 U.S. 6 (1951) and *Mansfield, C. & L. M. Ry. v. Swan*, 111 U.S. 379 (1884). Hence, the instant case should be dismissed for lack of jurisdiction due to Plaintiff's failure to properly evidence the required jurisdictional facts.

CONCLUSION

For the reasons set forth in this Petition for Rehearing, as

well as in the Petition for Certiorari previously filed, rehearing of certiorari should now be granted.

Respectfully submitted,



EARL LUNA,
1002 Dallas Fed. Savings Bldg.
Dallas, Texas 75201,
Attorney for Petitioners.

CERTIFICATE OF COUNSEL

Pursuant to Rule 58, I hereby certify that the foregoing Petition for Rehearing is presented in good faith and not for delay, and is restricted to the grounds specified in paragraph 2 of Rule 58.

Earl Luna

CERTIFICATE OF SERVICE

THE STATE OF TEXAS)

COUNTY OF DALLAS)

BEFORE ME, the undersigned Notary Public in and for Dallas County, Texas, on this day personally appeared EARL LUNA, who being by me duly sworn, upon oath stated: I, EARL LUNA, am a member of the Bar of the Supreme Court of the United States and have been the attorney of record for Petitioners in all proceedings had in the Courts below.

I further state upon oath that on the 31st day of October, A. D. 1973, I served copies of the foregoing Petition for Rehearing on the Respondent, Kenneth J. Hampton, d/b/a Hampton Vending Supply, by depositing the same in the United States Mail, with first class postage prepaid, addressed to the following counsel of record in the Courts below, at the address indicated, to wit: Mr. James L. Branton, of Carter, Callender, Branton & Gonzalez, Suite 200, 140 Main Plaza, San Antonio, Texas 78205.

Earl Luna

Earl Luna

SUBSCRIBED AND SWORN TO before me by the said EARL LUNA, this the 31st day of October, A. D. 1973.

Notary Public in and for
Dallas County, Texas